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No. 71-566

In the Supreme Court of the United States

OCTOBER TERM, 1971

SAM FORD FISHBEIN AND LEONARD YORDON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Petitioners submit their Reply to the Brief for the United States in Opposition:

FAILURE TO DISPOSE OF THE GUILTY VERDICT ON THIRTEEN COUNTS AS TO FISHBEIN AND THE EFFECT THEREOF

In the Brief in Opposition by the United States it is argued that no collateral consequences from the thirteen unresolved counts can flow to Petitioner Fishbein as long as he does not violate the terms of his probation. The United States cited *Berman vs. United States,* 302 U.S. 211, 212-213 (Opp. Brief 5). Berman deals only with the question of whether a judgment of the District Court, wherein the execution of sentence was suspended, was a final judgment for the purpose of appeal. This Court stated in *Berman*:

> "In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation between the parties on the

merits and leaves nothing to be done but to enforce by execution what has been determined."

It is submitted that the action of the Court of Appeals has precisely this effect. The jury verdict is left intact — and nothing remains to be done. At the completion of his probationary period Fishbein is left with a jury verdict of guilty on thirteen counts of the indictment. Petitioners' Petition detailed the fact that collateral consequences can and do arise from unresolved counts. *Sibron vs. New York,* 392 U.S. 40 demonstrates this Court's awareness of this problem. In effect, the United States tells this Petitioner that the only way he can obtain review is to violate the terms of his probation. Certainly this is not a desirable state of affairs.

THE EFFECT OF THE FAILURE TO FINALLY DISPOSE OF THIRTEEN COUNTS TAINTS THE JURY'S VERDICT ON THE REMAINING COUNTS

The United States argues that the fact that the Ninth Circuit found sufficient evidence to sustain the conspiracy count, as to both Petitioners, and one substantive count as to Fishbein, eliminates the possibility of "spill-over effect" from the unresolved counts. This begs the question. It is the "spill-over" with the jury that is the Petitioners' concern; not the "spill-over" as it affects the considered deliberation of Appellate Judges reviewing the evidence at leisure. As long as Petitioners are entitled to a trial by jury they are entitled to a trial on counts submitted to a jury, untainted by other counts which "bristles with difficult legal and factual problems." (Pet. App. 20). This is especially true in view of the finding of the Ninth Circuit that the problem of the sufficiency of

the evidence as to the conspiracy count "** is not without difficulty." (Pet. App. 17).

THE FAILURE TO MAKE TIMELY DISCLOSURE OF PARTIALLY EXCULPATORY MATERIAL

Petitioners cannot agree that their counsel was advised of the existence of questionnaires unrelated to any defendants. Their first awareness of this was midway through the trial. A fair sample of these questionnaires is before this Court in Appellant Exhibits 1-85 of the Supplemental Record on Appeal. Stated as plainly as we can, these questionnaires reveal the existence of persons who, in writing, expressed their feeling that the stock sale representations were not abnormal, outlandish or pressured sales. (Pet. 5). Naturally, these persons were not made the subject of counts of the indictment. They were persons who could have been called as defense witnesses and who, presumably, would have given favorable testimony. These persons were unknown prior to midway through the trial. If they had been known they could have been questioned, and a decision made whether or not to call them. Their information, as evidenced by Appellant Exhibits 1-85, was at least partially favorable. The Government knew of the existence of these witnesses and questionnaires and what they had said on the questionnaires. To argue that when these Petitioners found out about these witnesses, midway through the trial, they should have attempted to halt proceedings while they investigated their potential, is the height of impracticability, and its absurdity is evident to any trial lawyer.

It is specious to argue that the trial judge found on remand that the questionnaires had information as to non-disclosure of financial and property losses, and

this information was incriminating. It was not the questionnaires that Petitioners sought to introduce into the trial but the knowledge, feelings and thoughts of these witnesses as reflected by their representations in the questionnaires. This information was all exculpatory or partially exculpatory. The identity and state of mind of these investor witnesses (and by witnesses we do not mean persons called at the trial) was relevant and in the possession of the United States until ordered produced. A typical "storehouse of relevant fact" (*Dennis vs. United States,* 384 U.S. 855) which had been in the exclusive possession of the Government and concealed — perhaps by inadvertence. Petitioners' Counsel must take their chance that the United States could have benefitted by cross-examination of these witnesses. These Petitioners had the right to make their choice from the undisclosed witnesses, and this choice was denied them by the actions of the United States. As noted, certain witnesses were called by the United States and were effectively cross-examined, based upon information in their questionnaires, and the devastating nature of this cross-examination is typified by the fact that acquittals were gained on some of those counts. (Opp. Brief 7). It is not those produced witnesses who are the subject of Petitioners' Complaint but the unproduced witnesses and their knowledge.

It is submitted that the action of the United States in not identifying these witnesses and not furnishing pre-trial the questionnaires pertaining to them was most unfair.

THE FAILURE TO GIVE THE ACCOMPLICE INSTRUCTION

Apparently the failure to give the accomplice instruction presents an unresolved question of fact. The

record discloses an objection to the failure to give proposed instruction No. 12. Petitioners' retained copy of the instructions show instruction No. 12 to be the instruction printed in Appendix 2 of their Petition. The record of the trial shows the accomplice instruction to be No. 5, bearing the notation "withdrawn." Exceptions were made at the trial to the instructions by number, and it is logical to conclude that these Petitioners excepted to the refusal to give the instruction they numbered 12 in their retained copy. Some of present counsel were trial counsel and made the exception on page 1712 of the transcript. There is no independent recollection of withdrawing any request for the accomplice instruction, and no apparent reason exists for this withdrawal.

It is submitted that it is irrelevant that the coconspirators Tropp and Gottfried were only two of some 50 witnesses. Certainly a trial jury would be inclined to give great weight to persons presumably knowledgeable about the affairs of HiwayHouse.

It is submitted that the error was not harmless.

CONCLUSION

It is therefore respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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